02-RD-191760

BEFORE THE NATIONAL LABOR RELATIONS BOARD

KIPP ACADEMY CHARTER SCHOOL,

Employer/Respondent

v.

NICOLE MANGIERE, CHRISTOPHER DIAZ, and UNITED FEDERATION OF TEACHERS, LOCAL 2,

Petitioners/Involved Party.

On Request for Review from the Regional Director's Decision

Amicus Brief of Voices for International Business and Education, Inc. d/b/a International High School of New Orleans

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Statement of Interest

Voices for International Business and Education, Inc. is the operator of the International High School of New Orleans, a public charter school. While the Fifth Circuit recently ruled that Voices is not a political subdivision exempt from the Board's jurisdiction under the Act, the court did not address whether the Board should decline to exercise that jurisdiction. *Voices for Int'l Bus. & Educ., Inc. v. NLRB*, 905 F.3d 770, 773 (5th Cir. 2018). Voices therefore continues to have a direct interest in this Board's decision whether to decline to exercise jurisdiction over charter schools as a class.

What is more, Voices' interest is best understood in the unique factual context of New Orleans public education. Since Hurricane Katrina, charter schools *are* the public-education system of New Orleans. More than 90% of public-school students in Orleans Parish attend charter schools. 905 F.3d at 772. It is thus not an exaggeration to say that the entire city's public education will be affected by the Board's decision.

Argument

1. As a former member of this Board has recognized, labor disputes in charter schools will not have a substantial effect on interstate commerce.

Under 29 U.S.C. § 164(c)(1), the Board may decline jurisdiction over labor disputes involving a class of employers if the Board believes the "effect of such labor dispute on commerce is not sufficiently substantial" to

warrant exercising jurisdiction. 29 U.S.C. § 164(c)(1). Former Chairman Miscimarra aptly explained why labor disputes involving charter schools will not have that substantial effect on interstate commerce in his dissenting opinions in *The Pennsylvania Virtual Charter School* decision and the *Hyde Leadership Charter School* decision. Chairman Miscimarra demonstrated that local issues—not those of national or interstate importance—will "overwhelmingly predominate the creation, structure, and operation of charter schools." *The Pa. Virtual Charter Sch.*, 2016 NLRB LEXIS 624, *55 (Aug. 24, 2016). Education is, after all, an activity "essentially local in nature" and, as he put it, one that has a "unique and special relationship" with the state. *Id.* at *61. Performing those functions is a responsibility "peculiarly related to, and regulated by, local governments." *Id.* at *61-62.[1]

Elaborating, the former chairman pointed out that charter schools are, like traditional public schools, an "integral component" of public education, and are—like traditional public schools—publicly funded on a per-student basis and regulated by state and local authorities. *See id.* at *63.[2] Given the intensely local nature of education generally, then, and its

[1] The United States Supreme Court agrees. "Today, education is perhaps the most important function of state and local governments." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

[2] Providing free public education has been a hallmark of state government since Horace Mann originated the policy in Massachusetts over 150 years ago. Mann was, in fact, particularly influential in the organization of the public education system in New Orleans, having recruited the system's first superintendent in the 1840s. Donald E. DeVore & Joseph Logsden, *Crescent City Schools – Public Education in New Orleans 1841-1991*, 5-23 (Univ. of La. at Lafayette Press 2011) (1991).

pre-existing framework of regulation and oversight by the local authorities, the former chairman was correct in arguing that even if a particular charter school may not be deemed a political subdivision for jurisdictional purposes, labor disputes arising from charter-school employees "will have largely localized effects because of the state-and-local nature of charter schools' operations." *Id.* at *69. And what is more, because of their function providing public education, state laws "typically" apply the same laws to charter-school teachers as other public-school teachers so as to minimize the disruption that teacher strikes would cause. By seeking to limit those disruptions, state laws "necessarily diminish the effect of such disputes on interstate commerce." *Id.*

In short, the Board should decline to exercise jurisdiction over charter schools as a class because by their very nature, they concern an activity that is intrinsically and closely tied to their local communities, and one which is already regulated by state and municipal officials in ways designed to prevent or curb the disruptive effects of labor disputes. Charter schools teach the neighborhood's children; they do not engage in commerce across state lines in a way that would allow any of their labor disputes to "substantially" affect that commerce. *See* 29 U.S.C. § 164(c)(1).

2. The *ad hoc* approach of exercising jurisdiction in some cases but not others causes uncertainty in the application of labor law.

Fostering stability and uniformity in labor relations is one of the primary roles of this Board under the National Labor Relations Act. *See*

Pennsylvania Virtual at *74 (citing *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355 (1949)). The Act was meant to replace the various laws of the states with a "single, uniform, national rule." *Id.* (quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959)).

The handful of charter-school cases already decided by this Board demonstrates that exercising jurisdiction over them will not achieve a uniform, stable rule applicable nationwide. *See, e.g.*, *Pennsylvania Virtual* (exercising jurisdiction); *Hyde Leadership* (same); *contra LTTS Charter School, Inc.*, 366 NLRB No. 38 (Mar. 15, 2018) (finding the school was a political subdivision exempt from Board jurisdiction because Texas law granted the commissioner of education power to replace the school's board members). The *Hawkins County* standard for whether a school is a political subdivision of a state exempt from Board jurisdiction requires "a detailed, fact-intensive analysis" of a school's creation and leadership. *See Pennsylvania Virtual* at *80-81. The "variegated laws of the several states" control how a charter school is formed, governed, and regulated and therefore determine whether a particular school constitutes a political subdivision. *See Pennsylvania Virtual* at *75.[3] Some schools in some states may be exempt from Board jurisdiction while other schools in other states may not be, so it will be "impossible to reliably determine in advance whether the Board actually has statutory jurisdiction over any particular

[3] As of 2016, at least 41 states had charter-school laws. *See Pennsylvania Virtual* at *63 n.15.

charter school." *Id.* There will be too many variables involved for employees and managers of charter schools to know ahead of time whether state or federal labor law governs their relationship.

This problem, identified by former chairman Miscimarra, grows even worse when the Board considers that there can be variation *within* a state as to the kind of charter school involved and whether the Board would have statutory jurisdiction. In Louisiana, for example, there are several different types of charter schools created by state law, and they vary according to how they are created and what governing body authorizes and oversees them. *See, e.g.*, La. R.S. § 17:3973.[4] There could thus be one charter school in a state over which the Board may have jurisdiction but another type of charter school from the same state over which the Board does not have jurisdiction. That at least 41 states have a charter-school law does not fully describe the scope of the problem; each state is free to create separate categories of schools whose different modes of creation and governance may lead to different results in challenges to Board jurisdiction. *See Pennsylvania Virtual* at *63 n.15, *75.[5]

That is why the Board's involvement in charter schools is "self-defeating: the Board cannot possibly achieve stability of labor relations" or a

[4] In *Voices for International Business and Education, Inc. v. NLRB*, for example, Voices was a Type 2 charter school. 905 F.3d 770, 772 (5th Cir. 2018).

[5] Chairman Miscimarra noted that there is "immense factual variation" in the "creation, structure, and operation of different charter schools," which "vary widely depending on the particular state, county, city, or school district." *Pennsylvania Virtual* at *78.

single uniform national rule that displaces the laws of dozens of states. *Id.* at *76. With 41 states having charter laws, the Board would have to examine each state's law under the *Hawkins County* framework to determine if the particulars in each unique context satisfy the political-subdivision exemption, and it is not to be expected that this sort of case-by-case adjudication will lead to anything resembling a uniform, reliable, and predictable rule applicable across the country. The result instead will be a "jurisdictional patch-work—federal jurisdiction here, state jurisdiction there." *Id.* at *76. That will lead to "years of uncertainty for charter school employees, responsible officials, and state and local governments" about what law governs collective bargaining. *Id.* at *82.

The better choice is to avoid this danger and instead provide the reliability and uniformity of declining to exercise jurisdiction over charter schools as a class.

3. Declining to exercise jurisdiction is more consonant with the local control of education traditionally exercised by the states.

The United States Supreme Court recognizes that education is uniquely a local affair, referring to "local autonomy of school districts" as a "vital national tradition." *Freeman v. Pitts*, 503 U.S. 467, 490 (1992).[6] The Board's exercising jurisdiction over the labor relations between public schools and their employees will interfere with the local autonomy that

[6] Justice Scalia added that "no single tradition in public education is more deeply rooted than local control over the operation of schools." *Id.* at 505 (Scalia, J., concurring).

school districts and states have long had over public education, and will represent an unwelcome federal intrusion into the sovereignty and accountability of states and their local subdivisions.

Louisiana, for example, has responded to modern challenges facing public education by choosing an innovative solution in charter schools, and the Board should not extend its power over some public schools but not others in Louisiana merely because public charter schools are structured differently than traditional schools. *See, e.g.*, Amelia A. DeGory, Note, *The Jurisdictional Difficulties of Defining Charter-School Teachers Unions Under Current Labor Law*, 66 Duke L.J. 379, 400, 413-14 (2016) (noting that the Board's narrow reading of the *Hawkins County* test "implicates the federal-state balance" because education is part of the states' police power); *cf.* Raoul Berger, *Federalism: The Founders' Design* 74-75 (1987) (noting that the Framers deemed education a local matter reserved to the states).

The labor relations of state entities have likewise long been deemed local matters beyond federal reach. Indeed, in the National Labor Relations Act itself, Congress recognized state sovereignty in this area of the law and allowed the states and their subdivisions to retain flexibility in managing their own labor relations, and the salutary effect of the exemption has been the creation of state labor laws tailored to the needs and policies of each state. Some states, like New York in the *Hyde Leadership* case, have adopted schemes that employees think so favorable that the teachers' unions argue

against federal jurisdiction, while other states have chosen not to create their own labor board.

Louisiana, on the other hand, has elected to refrain from adopting a mandatory labor-relations scheme for public employees, and it has refrained from creating its own labor board for private-sector employees. State law does not allow employers to seek to enjoin certain public-employee strikes, but it also does not compel public-sector employers to engage in collective bargaining, nor has the State chosen to prohibit a public-sector employer from terminating employees who strike. *Cf. Davis v. Henry*, 555 So. 2d 457, 467-68 (La. 1990); La. Const. art. X, § 10(3).

Such differences between federal and state labor laws (and indeed among states' labor laws) illustrate the federalism concern at stake in the Board's choice to decline to exercise jurisdiction. There are meaningful differences between federal labor law and Louisiana labor law, and those differences no doubt have analogues in other states which boast charter-school programs. Where Congress has made clear its intention that the labor relations of the states' political subdivisions are to be controlled by state law, these differences are better respected by the Board refraining from exercising jurisdiction over *any* charter school, even those which do not qualify as a political subdivision.

Conclusion

Charter schools are public schools, and like other public schools, their labor relations are regulated by the states and will not meaningfully affect interstate commerce. Asserting jurisdiction over them on a case-by-case basis undermines the Board's overarching purpose of establishing a uniform and predictable rule. Voices therefore urges the Board to decline to exercise jurisdiction over charter schools as a class.

Respectfully submitted,

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Certificate of Service

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